

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,863

691

H. GABRIEL MURPHY,
Appellant,

v.

WASHINGTON AMERICAN LEAGUE BASE BALL
CLUB, INC., ET AL.,
Appellees.

Appeal from the United States District Court
for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit

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COUNTERSTATEMENT OF QUESTION PRESENTED

In the opinion of Appellees the question is:

Did the District Court correctly rule that Sec. 3 of the District of Columbia Business Corporation Act, § 29-903 of the District of Columbia Code, does not prohibit the Appellee Washington American League Base Ball Club, Inc. from moving its American League franchise to a city outside of the District of Columbia?

INDEX

	PAGE
Summary of Argument.....	1
Argument	2
I. The decision as to where the corporation shall conduct its business is a function of the board of directors	2
II. The proviso contained in Sec. 3 of the Act is not applicable to Appellee corporation.....	5
III. Assuming, Arguendo, that the proviso applies to reincorporated corporations, it does not have the meaning contended for by Appellant..	9
IV. Appellee's 1905 charter permitted it to remove its place of business from the District and it did not lose that right by its reincorporation under the 1954 Act.....	12
V. Comments on Appellant's Brief.....	13
Conclusion	16

TABLE OF CASES

<i>Bank of Augusta v. Earle</i> , 13 Pet. 519.....	3
<i>City of Seattle v. Western Union Telegraph Co.</i> , 21 Wash. 2d 838, 153 Pac. 2d 859.....	9
<i>Commonwealth v. Wm. Mann Co.</i> , 150 Pa. 64, 24 A. 601	8
<i>DeGanay v. Lederer</i> , 250 U.S. 376, 381, 63 L.Ed. 1042, 39 S.Ct. 524.....	8
<i>Eastern Trust & Banking Co. v. Willis</i> , 6 App.D.C. 375	3
<i>Montgomery v. Martin</i> , 294 Pa. 25, 143 A. 505.....	9
<i>Petition of Avar</i> , 144 N.Y.Supp. 2d 204.....	5
<i>Rudel v. Eberhard Faber Pencil Co.</i> , 146 N.Y.Supp. 2d 498	5
<i>U.S. v. Dickson</i> , 15 Pet. 141, 10 L.Ed. 689.....	9

<i>Van Tassel v. The Spring Perch Co.</i> , 113 Conn. 636, 155 A. 832.....	3
<i>Warren v. Barber Asphalt Paving Co.</i> , 113 Mo. 572, 22 S.W. 490.....	8
<i>Warren v. Fitzgerald</i> , 189 Md. 476, 56 A.2d 827.....	5
<i>Whitmire v. Cass</i> , 213 S.C. 230, 49 S.E. 2d 1.....	8
<i>Yates v. U.S.</i> , 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064	8

STATUTES

Act of Congress of 1901, 31 Stat. 284, § 29-201	12
§ 29-202	12
District of Columbia Business Corporation Act of 1954, c 269, 68 Stat. 180, D. C. Code 29-902 et seq. (1951 Ed., 1958 Supp.)	
Sec. 3 (Code § 29-903).....	1, et seq.
Sec. 4(j) (Code § 29-904(j)).....	3
Sec. 7(c) (Code § 29-905).....	11
Sec. 10 (Code § 29-907).....	9
Sec. 32 (Code § 29-916).....	2
Sec. 45(a) (Code § 29-920).....	10
Sec. 47 (Code 29-921(a)).....	10
Sec. 49 (Code § 29-921).....	6
Sec. 52 (Code § 29-921(f)).....	14
Sec. 88 (Code § 29-931).....	10, 11
Sec. 98 (Code § 29-932).....	10
Sec. 121(e) (Code § 29-936(e)).....	7
Sec. 122 (Code § 29-937).....	11
Sec. 129 (Code § 29-940).....	9
Sec. 141 (Code § 29-952).....	7, 15
Sec. 142 (Code § 29-952a).....	6, 13, 15
Sec. 146 (68 Stat. 238).....	14
Sec. 106 (Code § 29-933(g)).....	9

TEXTBOOKS

Webster's New International Dictionary, 2nd Ed.....	5, 6
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Appeal from the United States District Court
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BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

The Board of Directors of the Appellee corporation has the right to determine where the corporation shall engage in business and where the principal place of business of the corporation shall be located. Accordingly, the board has the power, if it determines that the best interests of the corporation so require, to transfer the League franchise of the corporation to a city outside the District of Columbia, unless Sec. 3 of the 1954 Business Corporation Act forbids. Appellees contend that the proviso in Sec. 3 does not prevent a transfer of the corporation's League franchise. In the first place the proviso applies only to corporations *organized* under the Act. The primary meaning of "organize" is to create a new

organization and that is the sense in which the word is used in Sec. 3. Appellee corporation was not organized under the Act but, on the contrary, was organized under the 1901 Act and only came under the 1954 Act by reincorporation in 1956. Consequently, the proviso does not apply to it. In the second place, if the proviso were held to apply to reincorporated corporations, it is clear that it does not require the corporation to maintain its principal place of business in the District throughout its corporate life. Analysis of the Act shows that when Congress intended to impose a requirement of that kind it expressed its intent in unmistakable terms and did not leave it to inference. The fact that Congress did not state that the principal place of business of a corporation must forever remain in the District means that Congress did not intend to impose any such requirement. Finally, under its original 1905 charter the corporate Appellee had the right to have its principal place of business without the District of Columbia and that right is confirmed to it by the 1954 Act.

Judge Pine's opinion in the District Court is an excellent analysis of the District of Columbia Business Corporation Act and Appellees urge that the order appealed from be affirmed upon the basis of that opinion.

ARGUMENT

I.

**The decision as to where the corporation shall
conduct its business is a function of the board
of directors.**

Except for a few matters specifically reserved for shareholder action by express statutory provision, none of which is pertinent here, the management of the business and affairs of a corporation is entrusted to its board of directors. This principle of corporate operation is expressly recognized by Sec. 32 of the 1954 Act (§ 29-916 of

the Code) which provides that "the business and affairs of a corporation shall be managed by a board of directors". Since at least as early as *Bank of Augusta v. Earle*, 13 Pet. 519, it has been established that a corporation may transact business outside the state that gave it birth. This rule was applied by this Court in *Eastern Trust & Banking Co. v. Willis*, 6 App.D.C. 375. Consistently with the foregoing, Sec. 4(j) of the Act, § 29-904(j) of the Code, authorizes a corporation

To conduct its business, carry on its operations, and have offices and exercise the powers granted by this chapter within and without the District of Columbia and to exercise in any State, Territory, district, colony, or possession of the United States, or in any foreign country the powers granted by this chapter, subject to the laws of such State, Territory, District, colony, or possession of the United States or such foreign country.

In the management of the corporate affairs, the board of directors has the power and duty to determine in what states the corporation shall do business and where the corporation's place or places of business shall be located. The case of *Van Tassel v. The Spring Perch Co.*, 113 Conn. 636, 155 A. 832, is in point. The company had been organized in 1854 under the laws of Connecticut. Its articles of association provided that the corporation should be "established and located in the City of Bridgeport, County of Fairfield and State of Connecticut". Until 1917 the manufacturing plant of the company was located at Bridgeport and thereafter at Stamford, Connecticut. In 1930 the Board of Directors by a 3-2 vote adopted a resolution that the corporation should establish a plant in the area of Detroit, Michigan. Suit against the corporation and the majority of the Board was filed by the two dissenting directors and by minority stockholders to prevent the carrying out of these proposals; they alleged that the removal from the state would constitute a fundamental change in the corporate plan and purpose and as

such would require stockholder consent. In disposing of these contentions the Supreme Court of Connecticut said:

We concur in the appellants' (plaintiffs') claim that the legality or illegality of the proposed removal must be determined upon the assumption that the action contemplated by the resolution is the removal of the entire plant from this state. The appellees point out that the resolution does not aim to change the domiciliary location of the company and its only effect is to authorize the doing of part of the corporate business outside the state. The legal right of a corporation to transact business outside the state cannot be seriously questioned in the absence of any prohibitory statute or charter provision. "It is implied in the charter or articles of association of every corporation, in the absence of an express provision to the contrary, that the business of the company may be carried on in the usual manner, by the usual agencies, abroad as well as at home. The shareholders of the company must be held to have impliedly agreed to this, and to have invested the company's agents with the necessary authority." 2 Morawetz, Private Corporations (2d Ed.) §958.

The appellants do not contest this right, (to conduct business outside the state) but they insist that the articles of association, by prescribing that the company "shall be established and located in this state, require that the *situs* of its physical plant shall be in Connecticut, and hence its removal from the State would be a fundamental change in the chartered scope, plan and purpose of the corporation, and thus beyond the legal powers of the board of directors.

* * * We can find no sufficient sanction for the claim that the use in these articles of the words "located and established" was intended not only to fix the domicile but to impose an additional restriction by prescribing the *situs* of the physical plant. The words are almost if not quite synonymous and in view of the nature of the business to be carried on it cannot fairly be supposed that it was intended to restrict the operations of the company within terri-

torial limits. While it may be competent to so limit the powers of a corporation by its charter, the articles of association or by statute, it would be unusual and contrary to any practice, so far as we are aware, in this State. To successfully accomplish such a result, it would be necessary to prescribe it in language specific and clear.

Petition of Avar, 144 N.Y.Supp. 2d 204, *Rudel v. Eberhard Faber Pencil Co.*, 146 N.Y.Supp. 2d 498, and *Warren v. Fitzgerald*, 189 Md. 476, 56 A.2d 827, are to the same effect.

The case before the Court does not present any question relating to the authority of the board of directors of Appellee corporation vis-a-vis its shareholders. The board of directors of the corporate Appellee have the power, if they determine that the best interests of the corporation so require, to transfer the League franchise of the corporation to a city outside the District of Columbia, unless Sec. 3 of the 1954 Act prevents them from doing so.

II.

The proviso contained in Sec. 3 of the Act is not applicable to Appellee Corporation.

The proviso upon which Appellant's entire argument is founded reads as follows:

Provided Further, That no corporation may be *organized* under this Act unless the place where it conducts its principal business is located within the District of Columbia. [Emphasis supplied]

Webster's New International Dictionary, 2nd Ed., defines "organized" as follows:

Transitive: 1. To furnish with organs; to give an organic structure to. 2. To arrange or constitute in interdependent parts, each having a special function, act, office, or relation with respect to the whole; to systematize; to get into working order; as, to organize an army; to organize recruits.

Intransitive: 1. To make oneself, or become, organic. 2. To make oneself, or become, systematized or constituted into a whole of interdependent parts.

Appellee corporation, however, was not organized under the 1954 Act; on the contrary it was organized under the 1901 Act pursuant to which it filed its Certificate of Incorporation on April 27, 1905 [J.A. 12-A]. The word "organized" is not apt to describe the process by which Appellee reincorporated under the provisions of the 1954 Act on July 16, 1956 [J.A. 14-A]. The act of reincorporating is different from the act of organizing. The steps are different, as a comparison of §§ 29-921 and 29-952 of the Code shows; and the substantive effects are different also, for in the case of organization corporate personality is acquired, while in the case of reincorporation corporate personality is continued under different statutory provisions. The difference is pointed up by a comparison of §§ 29-921c and 29-952a of the Code.

§ 29-921c. *Effect of issuance of certificate of incorporation.*

Upon the issuance of the certificate of incorporation, the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this chapter, * * * .

§ 29-952a. *Effect of issuance of certificate of reincorporation or incorporation.*

Upon the issuance under section 29-952 of a certificate of reincorporation or of incorporation, as the case may be, by the Commissioners the existence of the corporation shall be continued under this chapter, and such certificate shall be conclusive evidence that all conditions precedent required to be performed under section 29-952 have been complied with and that the corporation has been reincorporated * * * under this chapter, * * * .

The Act shows that the word "organized" was used in Sec. 3 with the limited meaning of a corporation first coming into existence without any immediately previous corporate history. Section 121(e), § 29-936(e) of the Code, requires "each domestic corporation organized, incorporated, or reincorporated under the provisions of the chapter" to pay an annual report fee. The words "incorporated" and "reincorporated" obviously refer to Sec. 141 of the Act, § 29-952 of the Code; the first part of that section, entitled "Reincorporation", under which Appellee was reincorporated in 1956, provides that "any corporation which is organized and existing under the laws of the District of Columbia on December 5, 1954 and which is organized for profit and for a purpose or purposes authorized by this chapter, may avail itself of the provisions of this chapter and become *reincorporated* hereunder" by following the prescribed steps; the second part of the section, entitled "Incorporation", provides that "any corporation which is created under the provisions of a special Act of Congress to transact business in the District of Columbia for profit and for purposes authorized by this chapter may avail itself of the provisions of this chapter and may become *incorporated* hereunder" by following the prescribed steps. These provisions and others in the Act indicate that the process by which Appellee availed itself of the provisions of the 1954 Act is technically described as *reincorporation* and was considered by Congress to have a meaning different from "organized".

When the 1954 Act became law there were many District of Columbia corporations which conducted their principal business at a place located outside the District of Columbia. Nothing in the Act suggests that such corporations could not reincorporate under its terms. If such a corporation could reincorporate under the Act, no reason is suggested why an existing District of Columbia corporation, such as Appellee, which conducts its prin-

principal business at a place within the District might not reincorporate under the Act and thereafter move its principal place of business to another state.

Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them; *DeGanay v. Lederer*, 250 U.S. 376, 381, 63 L. Ed. 1042, 39 S.Ct. 524.

Upon a first reading of the words of the proviso relied upon by Appellant, one derives only the meaning that at the moment when a corporation comes into being the place where it conducts its principal business must be in the District of Columbia. That is the meaning of "organized" for which Appellees contend and that meaning is the ordinary and usual meaning of the word and the one commonly attributed to it; *Yates v. U.S.*, 354 U.S. 298, 1 L.Ed.2d 1356, 77 S.Ct. 1064; *Whitmire v. Cass*, 213 S.C. 230, 49 S.E.2d 1; *Warren v. Barber Asphalt Paving Co.*, 113 Mo. 572, 22 S.W. 490; *Commonwealth v. Wm. Mann Co.*, 150 Pa. 64, 24 A. 601. In the *Yates* case the Supreme Court said (354 U.S. at 310):

* * * In these circumstances we should follow the familiar rule that criminal statutes are to be strictly construed and give to "organize" its narrow meaning, that is, that the word refers only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed "organizational." [citations omitted] Such indeed is the normal usage of the word "organize", * * *.

Other settled principles of statutory construction require that a proviso such as that found in Sec. 3 be strictly construed and that it not be extended to any case not clearly falling within its terms.

* * * we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that

where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof. * * *

U.S. v. Dickson, 15 Pet. 141, 165, 10 L.Ed. 689.

The rule was applied in the following cases: *Montgomery v. Martin*, 294 Pa. 25, 143 A. 505; *City of Seattle v. Western Union Telegraph Co.*, 21 Wash. 2d 838, 153 Pac. 2d 859.

Appellees submit, therefore, that the proviso is applicable only to corporations which first gain their corporate personality under the Act and that it is not applicable to the corporate Appellee which was organized in 1905 and only came under the 1954 Act by way of reincorporation.

III.

Assuming, Arguendo, that the proviso applies to reincorporated corporations, it does not have the meaning contended for by Appellant.

A section-by-section analysis of the Act shows how carefully Congress expressed its meaning throughout the Act, how explicitly it phrased a restriction when it intended one and imposed a penalty for its violation.

Section 10 of the Act, § 29-907 of the Code, requires each corporation to "have and continuously maintain in the District of Columbia—(a) a registered office which may be, but need not be, the same as its place of business; (b) a registered agent, * * *." Sec. 106 of the Act, § 29-933g of the Code, imposes similar requirements upon foreign corporations desiring to transact business in the District of Columbia. Sec. 129 of the Act, § 29-940

of the Code, provides a monetary penalty for a corporation either domestic or foreign which fails to maintain a registered office or a registered agent in the District.

Section 45(a) of the Act, § 29-920 of the Code, requires each corporation to keep correct and complete books and records and also requires each corporation to "keep at its registered office or principal place of business, or at the office of its transfer agent or registrar, a record of its shareholders, * * *." It is clear that the registered office and the principal place of business of the corporation may be different; it is also clear that the corporation's transfer agent or registrar may be and often will be outside the District of Columbia; therefore it follows that the Act contemplates that the principal place of business may also be outside of the District.

Section 47 of the Act, § 29-921a of the Code, requires the articles of incorporation to set forth certain items including, [paragraph (j)] the address, street and number of its initial *registered office* and the name of its initial *registered agent* at that address. The Section contains no reference to the corporation's *principal place of business*.

Section 88 of the Act, § 29-931 of the Code, provides for the involuntary dissolution of a corporation by Court decree upon certain grounds, including [paragraph (c)] failure to appoint and maintain a registered agent and [paragraph (d)] failure to file with the Commissioners notice of a change of its *registered office* or *registered agent* within thirty days after the change. The Section does not refer to the corporation's *principal place of business*.

Section 98 of the Act, § 29-932 of the Code, requires each corporation to file with the Commissioners on or before April 15th of each year an annual report setting forth, among other things, the address of its *registered*

office in the District of Columbia and the name of its *registered agent* at that address. Sec. 122, § 29-937 of the Code, provides that if any corporation incorporated or reincorporated under the act shall for two years fail to pay the annual report fee or to file the annual report its articles of incorporation shall be void and all of its powers shall be inoperative. Neither section mentions the corporation's *principal place of business*.

From the foregoing examples it clearly appears that the proviso in Sec. 3 can not support the meaning which Appellant attributes to it and that, had Congress intended the proviso to have that meaning, it would have written it to read somewhat as follows:

Provided Further, That no corporation may be organized, incorporated or reincorporated under this Act unless the place where it conducts its principal business is located within the District of Columbia and each corporation organized, incorporated or reincorporated under this Act shall at all times conduct its principal business at a place located within the District of Columbia; and in the event that any corporation organized, incorporated or reincorporated under this Act at any time ceases to conduct its principal business at a place located within the District of Columbia then the corporation may be dissolved involuntarily by a decree of a court of equity in an action instituted by the Commissioners.

At the same time Congress would have had to insert suitable provisions in Sec. 7(c), § 29-905 of the Code, and in Sec. 88, §29-931 of the Code, empowering the Commissioners to bring proceedings against the corporation upon this ground inasmuch as neither section authorizes disciplinary action against a corporation by reason of its failure to maintain its principal place of business in the District.

Certainly, if Congress had intended the proviso to carry the meaning which Appellant attributes to it, Congress

would have expressed that meaning in the same clear terms that it used elsewhere in the Act. It did not do so and the obvious and only inference to be drawn is that it did not intend what Appellant says it did.

IV.

Appellee's 1905 charter permitted it to remove its place of business from the District and it did not lose that right by its reincorporation under the 1954 Act.

Appellee was originally incorporated in 1905 under the Act of Congress of 1901, 31 Stat. 284, § 29-201 of the Code. The subchapter under which Appellee was incorporated is entitled "manufacturing, agricultural, mining, mechanical, insurance, mercantile, transportation, marketing, and savings bank corporations". Obviously it was contemplated by Congress that such corporations might carry on all or substantially all of their business outside of the District of Columbia.

The 1901 Act provided (§ 29-202 of the Code) that the certificate of incorporation should state "the name of the place in the District in which the operations of the company are to be carried on". In response to this requirement, the original certificate of incorporation stated that "the operations of the company shall be carried on in the City of Washington, District of Columbia" [J.A. 12-A]. The 1901 Code provision certainly did not mean that the business of the corporation must be confined to the City of Washington or the District of Columbia; in fact, Appellee's stadium has never been within the City of Washington and in each year since 1905 it has played at least half its games outside of the District of Columbia. The 1901 Code language, read in the light of the legal right of a corporation to transact business outside the state of its origin, was merely the equivalent of the modern requirement that the corporation have a registered office and

agent upon whom process may be served. Likewise, the statement quoted from the certificate of incorporation intended only to indicate the place in the District where an office would be maintained; it seems likely that a street address is what the Code intended to require. Accordingly, it is submitted that under the 1901 Act the corporation had the power to carry on its affairs outside of the District and to have its principal office outside the District if it chose to do so. This power is expressly confirmed to the corporation by the terms of Sec. 142 of the 1954 Act, § 29-952a of the Code, in the following words:

Upon the issuance under section 29-952 of a certificate of reincorporation or of incorporation, as the case may be, by the Commissioners * * * all privileges, franchises, and powers theretofore belonging to said corporation * * * shall be and the same are hereby ratified, approved, and confirmed and assured to such corporation with like effect and to all intents and purposes as if the same had been originally acquired through incorporation under this chapter * * *.

V.

Comments on Appellant's Brief

In his brief Appellant argues that the "principal place of business" requirement was intended to be a permanent limitation and that only such an interpretation of the Sec. 3 proviso would give effect to the intent of Congress. Appellant says [p. 13] that it would serve no purpose for Congress to require a corporation to have the place where it conducts its principal business within the District at the time when it is organized and to impose no such requirement after organization has been completed. The argument fails for it is clear that the requirement that a corporation shall have its principal place of business within the District when it is organized will serve to divert, to Delaware or other States whose statutes con-

tain no such limitation, business that might otherwise come to the District and that is all that Congress intended to accomplish. In other words, the proviso operates sufficiently *in terrorem* when given the meaning attributed to it by the District Court and nothing in the Act or its history indicates that it should be given the destructive and nullifying effect for which Appellant contends.

As Judge Pine noted in his opinion [J.A. 36-A] it would not "be common sense to construe the Act so narrowly that a corporation's principal place of business would remain imprisoned in the District until the end of its existence irrespective of changed conditions dictating or compelling, perhaps in the interest of survival, that it be removed elsewhere; * * *". If the Court were to adopt Appellant's construction of Sec. 3 the usefulness of the Act would be completely destroyed. Men would hesitate to incorporate under a law that would confine their activities to the District for all time. The 1901 Act would be preferable to the 1954 Act so construed; yet Sec. 146 of the Act (68 Stat. 238) provides that after December 5, 1954 no corporation shall be incorporated under any other statute or Act in force in the District; and so the ring would be complete, the plight of the District businessman worse than it was prior to 1954, and the efforts of lawyers and legislators to obtain a usable modern corporation law for the District would have come to naught.

Appellant's contentions are inimical to the interests of the local business community and go far beyond the meaning and intent of the few words of the proviso.

At pages 14 and 15 of his brief Appellant contends that "organize" is used in a continuing sense both in the first clause of Sec. 3 and in the proviso. The argument fails as is demonstrated by the fact that Sec. 52 of the Act, § 29-921f of the Code, which authorizes the amendment of articles of incorporation, provides that articles of incorporation as amended may contain only such provisions

as might be lawfully contained in original articles of incorporation. This clearly indicates that Congress recognized that the word "organized" as used in Sec. 3 refers only to the moment of original incorporation and that express language was required to prevent a corporation from changing its charter so as to permit it to engage in illegal or unauthorized purposes at a later time.

Appellant argues [pp. 22-27] that, by virtue of the provisions of Sec. 142, § 29-952a of the Code, the corporate Appellee is "subject to all of the provisions of" the Act "as fully and to the same extent as if" it had originally been incorporated thereunder. Having reincorporated under the Act, the corporate Appellee is of course subject to the provisions of the Act. From this Appellant argues that the Appellee was required to have its principal place of business in the District of Columbia when it reincorporated under the Act. Appellant's argument lacks merit. Sec. 142 says that

* * * upon the issuance * * * of a certificate of reincorporation * * * the existence of the corporation shall be continued * * * and the corporation shall be entitled to and be possessed of all the privileges, franchises and powers and subject to all the provisions of this Act as fully and to the same extent as if such corporation had been originally incorporated under this chapter; * * *.

Obviously the reincorporated corporation only becomes subject to the provisions of the Act after the reincorporation has occurred and, therefore, the proviso of Sec. 3 does not come into play. Appellees have already pointed out, *supra*, p. 8, that nothing in the Act suggests that an existing corporation such as Appellee must have its principal place of business in the District in order to avail itself of the provisions of Sec. 141, § 29-952 of the Code, and reincorporate under the Act. Once reincorporated, there is certainly nothing in the Act that requires the corporation to relocate its principal place of business in

the District if it happens to be out of the District at the time of reincorporation.

CONCLUSION

The interpretation of Sec. 3 urged by Appellant would have calamitous effects and should be accepted only if the statute plainly requires that result. The statute obviously does not require or even permit such a result and therefore Appellant's contentions should be rejected. The opinion of Judge Pine correctly analyzes the provisions of the Act and correctly interprets the intention of Congress and the order entered pursuant to that opinion should be affirmed.

Respectfully submitted:

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